RECENT ENGLISH DECISIONS.

In the Court of Queen's Bench—June 15, 1858.

DALYELL *vs.* TYRER AND OTHERS.[1]

1. The lessee of a ferry hired of the defendants for the day a steamer, with a crew, to carry his passengers across. The plaintiff, having paid his fare to H, passed across on the steamer, and while on board was injured by the breaking of a rope, owing to negligence of the crew in the manner of mooring:—*Held*, that the crew remained the servants of the defendants, who were therefore liable for their negligence; and that, as the negligence was such as would have made the defendants liable to a mere stranger, and the plaintiff was on board with their consent, it was immaterial that he was a passenger under a contract with H.

2. The declaration alleged that the defendants were possessed of a steamer navigated by their servants; that the plaintiff was lawfully, and with the defendants' consent, a passenger for hire on board the steamer; that it was the duty of the defendants' to navigate the steamer with reasonable care and skill, and to provide proper tackle, &c., that the defendants did not navigate with reasonable care and skill, and did not provide proper tackle, whereby and by the breaking of a rope, the plaintiff was injured. Pleas, not guilty; that the defendants were not possessed of the steamer navigated by their servants; that the plaintiff was not lawfully, and with the defendants' consent, a passenger for hire on board the steamer; and a traverse of the alleged duty of the defendants. A verdict having been found for the plaintiff,—Held, on a motion to enter the verdict on each or any of the pleas for the defendant, and in arrest of judgment, that the above facts sufficiently proved the allegations traversed; and that the declaration disclosed a sufficient cause of action.

Declaration, that the defendants were possessed of a steam-ship, being navigated by their servants, and the plaintiff was lawfully, and with the consent of the defendants, a passenger for hire on board the steam-ship; and it was the duty of the defendants to navigate the steam-ship with reasonable care and skill, and to provide the same with all fit and proper and necessary tackle and ropes. That the defendants, neglecting their duty, did not navigate the steam-ship with such reasonable care and skill, and did not provide the same with such fit and proper and necessary tackle and ropes,

[1] This cause was heard at the sittings after Trinity term, Erle, and Hill, JJ. being the only Judges present.

whereby and by the breaking of part of the tackle used about the said vessel the plaintiff was struck in the face and was then greatly injured, &c.

Pleas—First, not guilty.

Secondly, that the defendants were not possessed of the ship navigated by their servants as alleged.

Thirdly, that the plaintiff was not lawfully, and with the consent of the defendants, a passenger for hire on board the ship as alleged.

Fourthly, that it was not the duty of the defendants to navigate the ship with care and skill, and to provide the same with the tackle and ropes, as alleged.

At the trial, before Byles, J., at the Spring Assizes at Liverpool, it appeared that the plaintiff had contracted with one Hetherington, the lessee of the steam-ferry, called Rock Ferry, from St. George's Pierhead, at Liverpool, to Rock Ferry Point, on the opposite side of the Mersey, to carry him across whenever he required, being the holder of a season ticket. On the day in question, in consequence of a regatta, additional accommodation was required, and Hetherington agreed with the defendants, who were the trustees of a steam-tug company, for the hire, at ten guineas, of one of their vessels, called the *Pilot*, together with a crew, &c., to assist in carrying the passengers across the ferry, for the whole day. The plaintiff crossed in the *Pilot* from Liverpool, and on the arrival at Rock Ferry Point, in bringing the vessel alongside, a rope with a hook was thrown from the vessel, by direction of the master, and fastened to a ring on shore, but the strain becoming very great the hook broke, and part of it flew back and injured the plaintiff severely. The jury found that there was negligence on the part of those navigating the vessel, in the way in which they allowed the vessel to swing round, and so causing the accident, and returned a verdict for the plaintiff, damages 600*l.*, leave being reserved to the defendants to move to enter it for them on any of the four pleas.

In Easter term April 19, *Atherton* obtained a rule *nisi* accordingly, to enter the verdict for the defendants on "not guilty" and "not possessed," on the ground that the master and crew of the

Pilot were not the servants of the defendants at the time of the accident, nor persons for whose negligent navigation the defendants were responsible in point of law; to enter the verdict on the third plea, on the ground that the plaintiff was not a passenger for hire payable or paid to the defendants; and on the fourth plea, on the ground that no distinct matter of fact was proved in support of the averment of duty traversed by that plea, and that the facts stated without such averments did not raise the duty; or to arrest the judgment on the ground that the declaration did not show any contract or other ground of action against the defendants for the negligence relied on.

Edward James and *Milward* showed cause.—The defendants say, first, that they were not liable for the negligence found by the jury. The master and crew of the defendants' vessel remained their servants, although paid by Hetherington. He was the charterer of the vessel with her crew and tackle already, and the owner therefore remained liable, on the principle of the judgment of Abbott, C. J., and Littledale, J., in *Laugher* vs. *Pointer*,[1] affirmed by *Quarman* vs. *Burnett*,[2] *Milligan* vs. *Wedge*,[3] and *Allen* vs. *Hayward*,[4] showed that the defendants remained liable for the misfeasance of their servants. *Fenton* vs. *The Dublin Steam Packet Company*,[5] is precisely in point, and is a stronger case than the present in favor of the defendants' liability. Hetherington in no way interfered with the management of the vessel, and exercised no control over the master and crew: his hiring was, in fact, *locatio navis et operum magistri et nauticorum*, in which case as pointed out in the judgment in *Schuster* vs. *M'Keller*,[6] the owner, being in possession of the ship by his master and crew, is liable for their negligence. Secondly, it is said, that inasmuch as the plaintiff was not a passenger for hire

[1] 5 B. & C. 547.
[2] 6 Mee. & W. 499; s. c. 9 Law J. Rep. (N. S.) Exch. 308.
[3] 12 Ad. & E. 736; s. c. 10 Law J. Rep. (N. S.) Q. B. 19.
[4] 7 Q. B. Rep. 960; s. c. 15 Law J. Rep. (N. S.) Q. B. 99.
[5] 8 Ad. & E. 835; s. c. 8 Law J. Rep. (N. S.) Q. B. 28.
[6] 26 Law J. Rep. (N. S.) Q. B. 281.

to be paid to the defendants, but to Hetherington, he is prevented from recovering from the defendants. But although he might have been able to sue Hetherington, it does not follow that his contract with him disentitles the plaintiff from recovering from the defendants. The facts showed that the plaintiff was lawfully on board with the defendants' consent, and that the negligence was such as would entitle a stranger to recover against the defendants; so that the contract with Hetherington is immaterial: the defendants are liable for negligence independently of contract. Thus, in *Pippen* vs. *Sheppard*,[1] and *Gladwell* vs. *Steggall*,[2] a medical men was held liable to a patient for unskillful treatment, although some third person employed him, and paid and was to pay him for his attendance. In *Longmeid* vs. *Holliday*,[3] Parke, B., in delivering the judgment of the court, after citing and approving the principle of those two cases, says, "If a stage-coach proprietor, who may have contracted with the master to carry his servant, is guilty of neglect, and the servant sustains personal damage, he is liable to him; for it is a misfeasance to him if, after taking him as a passenger, the proprietor or his servant drives without due care, as it is a misfeasance towards every one traveling on the road." And in *Marshall* vs. *The York, Newcastle and Berwick Railway Company*,[4] a railway company were held liable to a servant for the negligent loss of his luggage, although the contract was made by the master. The third point made by the defendants, that no duty on their part to navigate the vessel carefully was either shown on the declaration or proved, is in effect involved in the other two points. If the facts proved showed negligence on the part of the defendants for which the plaintiff could maintain an action against them, there was a duty proved on the part of the defendants, which is sufficiently shown on the declaration.

Atherton and *J. C. Heath*, in support of the rule. The servants were not the servants of the defendants, but of Hetherington for the time being; Hetherington was liable by reason of his contract with

[1] 11 Price, 400.

[2] 5 Bing. N. C. 733; s. c. 8 Law J. Rep. (N. S.) C. P. 361.

[3] 6 Exch. Rep. 761; s. c. 20 Law J. Rep. (N. S.) Exch. 430.

[4] 11 Com. B. Rep. 655; s. c. 21 Law J. Rep. (N. S.) C. P. 34.

the plaintiff to carry him safely; but there was no contract between the plaintiff and the defendants. *Laugher* vs. *Pointer*, and all that class of cases are at once distinguishable; the right of action was irrespective of all contract, the action being brought by a mere stranger. The declaration in the present case is clearly for a breach of duty arising from contract; and not one of the material allegations, all of which were traversed, was proved as laid.

[EARLE, J.—Cannot the plaintiff sue the defendants as a mere stranger, for personal injury arising from their negligence?]

The declaration is not so framed. *Legge* vs. *Tucker*,[1] shows that this action is founded on contract, and that there is no duty without the contract on the part of the defendants to carry the plaintiff safely. The persons with whom the contract is made are alone liable. *Winterbottom* vs. *Wright*,[2] *Blakemore* vs. *The Bristol and Exeter Railway Company*,[3] *Southcote* vs. *Stanley*,[4] and *Blakemore* vs. *The Bristol and Exeter Railway Company* show that the merely being lawfully on board imposes no duty on the defendants. You connot convert an action founded on contract into a mere action of tort, *Jennings* vs. *Randall*,[5] *Marshall* vs. *The York, Newcastle and Berwick Railway Company* is distinguishable; there the defendants contracted with somebody to carry safely, and they were common carriers. *Pippin* vs. *Sheppard*, is distinguishable on the same ground. So in *Coggs* vs. *Bernard*,[6] there was a contract to carry safely. The declaration is bad in arrest of judgment, as showing no duty on the part of the defendants; it is not said that the hire was to be paid to them—*Dartnall* vs. *Howard*.[7] But assuming that the declaration may be held good, if the allegation that the defendants were guilty of negligence by their servants is sufficient, the facts will not sustain the allegation that the ship was being navigated by their servants. *Newberry* vs. *Colvin*,[8] is an authority that the defendants did not remain liable for the acts of the master

[1] 1 Hurl. & N. 500; s. c. 26 Law J. Rep. (N. S.) Exch. 71.
[2] 10 Mee. & W. 109; s. c. 11 Law J. Rep. (N. S.) Exch. 415.
[3] 27 Law J. Rep. (N. S.) Q. B. 167.
[4] 1 Hurl. & N. 247; s. c. 25 Law J. Rep. (N. S.) Exch. 339.
[5] 8 Term Rep. 355. [6] Ld. Raym. 909; s. c. 1 Sm. L. C. 82. [7] 4 B. & C. 345.
[8] 7 Bing. 190; s. c. (in error) 9 Law J. Rep. (N. S.) Exch. 13.

and crew. Where a vessel is chartered for a particular voyage, as here, there must be something more than the fact of their being owners to make the owners liable—*Mackenzie* vs. *Rowe*,[1] *James* vs. *Jones*.[2]

ERLE, J.—I am of opinion that this rule ought to be discharged. The facts I take to be these: The plaintiff made a contract with Hetherington to be carried across the ferry, and was accordingly a passenger on board this vessel which Hetherington had hired of the defendants, together with the crew, to carry his customers across; and in performing the passage those on board the vessel were guilty of negligence in their manner of mooring the vessel. Are the defendants answerable for this negligence? It is clear the defendants were in possession of the vessel, having the command of their servants, and supplying the very tackle which broke and caused the injury; and they would have been responsible if a mere stranger standing on the pier had been injured. *Fenton* vs. *The Dublin Steam-Packet Company* is directly in point; and *Quarman* vs. *Burnett*, enunciates the same principle. Can it be said, then, that the plaintiff lost this right, which he would have had as a stranger against the defendants, because he was a passenger on board of the vessel with the consent of the defendants, on a contract of hire to be paid to Hetherington and not to the defendants? This relation might give him greater rights, but it cannot surely take away a right which he would have had as a stranger, independently of any contract. This point was, in some degree, considered in *Marshall* vs. *The York, Newcastle and Berwick Railway Company* and *Gladwell* vs. *Steggall*. It was much pressed upon us that the declaration was not proved. I am of opinion that the facts proved it according to the ordinary meaning of the words employed; it states that the defendants were possessed of the vessel, being navigated by their servants, and the plaintiff was there lawfully, and with the consent of the defendants, as a passenger for hire on board the vessel, and it was the duty of the defendants to navigate it with reasonable care

[1] 2 Camp. 482. [2] Abbott on Shipping, 43.

and provide proper tackle. Traverses were taken on all these allegations. That the defendants were possessed I have already expressed my opinion; it is clear that the plaintiff was on board the vessel with the defendants' consent, and was a passenger for hire in the sense that the plaintiff must be understood to mean. After the facts proved, every intendment must be made in favor of the meaning which they will sustain; as to the issue that it was the duty of the defendants to navigate the vessel with reasonable care: if that allegation is material, it was proved in the sense the plaintiff must be taken to have intended; and as to the material fact, it is clear from the finding that they did not perform this duty with proper care. The substance of the case is in favor of the plaintiff, and I see no technical objection which cannot be disposed of also in his favor. The rule must, therefore, be discharged.

HILL, J.—I am of the same opinion. The first question is, whether the persons in charge of the steamer were the servants of the defendants. It is quite clear from a series of cases, beginning with *Laugher* vs. *Pointer*, followed by *Fenton* vs. *The Dublin Steam-Packet Company* and *Quarman* vs. *Burnett*, that the persons were the servants of the defendants, and that the defendants were responsible for their negligence; they were selected and hired by the defendants, and remained under their control, and the defendants had power at any time to change the persons navigating the vessel and the tackle also; therefore, on the first point, the facts fully established the case on the part of the plaintiff. The second question is, whether the fact, that the plaintiff's contract as passenger was with Hetherington, disentitles him from recovering from the defendants. I think it is wholly immaterial whether the plaintiff was a passsenger or not. Under the circumstances, it is quite clear that if he had been a stranger on the landing-pier he could have maintained an action; and he was clearly lawfully on board with the defendants' consent, therefore the allegation that he was a passenger for hire is wholly immaterial, and neither hurts nor furthers the plaintiff's case. Then, as to the allegation of duty on the part of the defendants, all the allegations of the declaration must be

taken together, and read in the mode pointed out by my brother Erle, and it is quite clear that it was the duty of the defendants to navigate their vessel so as not to put the persons of the Queen's subjects in peril; all the allegations in the declaration, therefore, appear to me to have been sufficiently proved, and the rule must be discharged.

Rule discharged.

NOTICES OF NEW BOOKS.

AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA. To which is prefixed an Historical Sketch of Slavery. By THOMAS R. R. COBB, of Georgia. Vol. I. Philadelphia: T. & J. W. Johnson. Savannah: W. Thorne Williams. 1858. pp. 358.

The subject of this work is one that does not altogether fall within our jurisdiction. It has a twofold aspect, which renders our competency at least doubtful. So far as slavery is to be considered as a mere question of municipal law, like the relation of parent and child, or of husband and wife, and its discussion confined to the development of established principles, and their application to novel circumstances, we may doubtless exert a lawful criticism over any book which happens to be written about it. On the other hand, in its political and ethical bearings the subject is too wide, too deep, too perplexed to justify us in sitting in judgment upon its dangerous debates, without a special commission. *Tantas componere lites* is beyond the province of this humble tribunal.

Looking at Mr. Cobb's treatise from our proper stand-point, we take pleasure in saying that it is written with great learning and ability. No decision or text-writer on the common law seems to have been overlooked; and in foreign law, codes, digests, and jurisconsults have been conscientiously studied, and everything that could strengthen his arguments or illustrate his doctrines has been drawn from them. The historical introduction, in particular, displays much care and research, and where its reasoning fails to convince, it will, in all candid minds, command respect for its fairness and vigor.